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No. 02-1304

IN THE

Supreme Court of the United States

ESPLANADE PROPERTIES,

Petitioner,

v.

CITY OF SEATTLE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici curiae address only the second question presented by the Petition:

Whether the "public trust doctrine" articulated by the City of Seattle in this case as justification for denying all economically productive use of Petitioner's property constitutes a "background principle[]" of property law, *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1029 (1992), sufficient to preclude consideration of Petitioner's claim under the Fifth Amendment's Takings Clause.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF)[1] is a public interest law and policy center with supporters in all 50 states, including many in the State of Washington. WLF regularly appears in legal proceedings before federal and State courts to defend the principles of free enterprise and limited government. WLF has appeared before this Court in numerous cases involving Fifth Amendment regulatory taking claims. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 5687 (1999); *Dolan v. City of Tigard,* 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). WLF is representing a South Carolina landowner whose regulatory takings claim were before the Court last year and are now before the South Carolina Supreme Court on remand. *McQueen v. South Carolina Coastal Council,* 340 S.C. 65 (2000), *vacated and remanded for reconsideration in light of Palazzolo v. Rhode Island,* 533 U.S. 943 (2001). Mr. McQueen's regulatory taking claim has been met with a "public trust doctrine" defense almost identical to the one raised herein.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study,

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici are concerned that if the Ninth Circuit's decision is allowed to stand, governments seeking to avoid regulatory taking claims will have been handed a recipe for ensuring that all such claims are defeated. It is uncontested in this case that Petitioner paid substantial sums for its property and, as a result of regulations imposed by the City of Seattle, has been denied all economically productive use of that property. Nonetheless, it has been denied all compensation for its loss on the ground that allowing Petitioner to develop its land would cause some amount of environmental harm. *Amici* do not dispute that government has the right to invoke an environmental rationale as the basis for prohibiting a landowner from developing his property. Nonetheless, when the forms of development thus blocked have been approved for numerous similarly situated landowners, *amici* believe that the landowner is entitled to be compensated for his losses. *Amici* oppose efforts by governments to latch onto a newly-discovered "public trust doctrine" as a means of avoiding compensation and thereby "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960).

Amici have no direct financial interest in the outcome of this case. They are filing due solely to their interest in protecting the private property rights of all Americans. *Amici* are filing this brief with the consent of both parties. The written consents have been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby adopts by reference the Statement of the Case contained in the Petition.

In brief, Petitioner Esplanade Properties ("Esplanade") owns property along the shore of the harbor of Respondent City of Seattle. The land is classified as first class (*i.e.*, urban) tidelands; it is dry for half of the day during low tides and is submerged in water for the other half of the day during high tide.

Esplanade purchased its property in 1991 for $40,000, with plans to develop the property as residential housing. Esplanade's chain of title dates back to 1906, when its predecessor in interest purchased the property from Seattle. During the past century, Seattle's tidelands have been extensively developed, transforming Seattle into one of the leading port cities in the nation. Indeed, it was precisely to encourage such development that Seattle sold off much of its tidelands.[2]

At the time the 1991 purchase, Esplanade's property was zoned SF 7200, meaning that the only permissible

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[2] Appendix F to the Petition is an authoritative history of policies adopted by the State of Washington to encourage development of the State's tidelands. Kenan R. Conte, *The Disposition of Tidelands and Shorelands: Washington State Policy 1889-1982,* Nov. 1982. There is no serious dispute of Conte's conclusions: the Washington legislature at the turn of the 20th century adopted a policy of encouraging the sale of tidelands into private hands, a "policy which would facilitate the growth and development which the State depended on." Pet. App. F-5.

development was single-family residential housing, medium density. Pet. App. C-2. The property was also subject to the state Shoreland Management Act (SMA), RCW 90.58, which had been adopted by the Washington legislature in 1972 to control shoreland development. Also, Seattle had adopted regulations (Seattle's Shoreland Master Program, or "SSMP") to implement the SMA. As the district court noted, the SSMP as of 1991 "seemingly allowed above-water residential construction" on Esplanade's property. Pet. App. C-2.

Accordingly, soon after purchasing its property Esplanade submitted a plan to Seattle to construct nine above-water residential houses. But by 1993, it became increasingly clear that Seattle would not permit any houses to be built on the property. Seattle zoning regulations require single-family homes to have on-site parking, but Seattle interpreted the SSMP as prohibiting parking built over water in a residential zone. *Id.* That interpretation prohibited any residential development, since it obviously was not possible to comply both with a rule *requiring* on-site parking and a rule *prohibiting* on-site parking. Moreover, that interpretation effectively prohibited *any* economically beneficial use of the property, because the property was zoned for residential uses only. Esplanade continued to seek approval of its development plans for several more years, but those efforts proved fruitless. In 1998 Seattle canceled Esplanade's development application on the ground that Esplanade had failed to address several design issues raised by the City -- most prominently, the parking issue. *Id.* at C-4 - C-5.

Esplanade thereafter filed an inverse condemnation suit against Seattle in state court, seeking to recover damages allegedly inflicted by Seattle's regulation of its property. The case was later removed by Seattle to federal court. The federal district court initially granted Seattle's motion for summary judgment on Esplanade's substantive due process claims, holding that the only recourse open to Esplanade was a taking claim under the Fifth Amendment to the U.S. Constitution and Art. I, § 16 of the Washington Constitution. *Id.* D-1 - D-6.

On October 31, 2001, the district court granted summary judgment to Seattle on the taking claims. *Id.* C-1 - C-21. First, the court concluded that Esplanade had failed to establish that Seattle's actions were the "proximate cause of its injury." *Id.* C-7 - C-10. That conclusion was based on the court's findings that: (1) Seattle's ruling that on-site parking was both required and prohibited was based on its "reasonable interpretations of the SSMP," *id.* C-8; (2) the development project was not "feasible" because it could never have complied with other provisions of the SMA and the SSMP, *id.* C-8 - C-9; and (3) the project was not "feasible" because Esplanade did not show that it could have raised the funds necessary to complete the project. *Id.* at C-10.

Second, the court articulated an "alternative basis" for denying Esplanade's taking claim: the "public trust doctrine" -- which the court deemed to be part of the "background principles of Washington law" -- barred Seattle and the State of Washington from approving the development project, even if they had been inclined to approve it. *Id.* C-11. The court stated that the public trust doctrine "'prohibits the State from disposing of its interest in the waters of the state in such a

way that the public's right of access is substantially impaired.'" *Id.* C-13 (quoting *Weden v. San Juan County,* 135 Wn. 2d 678, 698-99 (1998)). While conceding that the public trust doctrine as it existed in the early part of the 20th century would not have prohibited Esplanade's development, the court held that that doctrine has been modified in recent years, particularly by adoption of the SMA in 1971. *Id.* C-15 - C-16. "Washington courts have, accordingly, recognized that whatever public trust doctrine existed prior to the enactment of the SMA has been superceded and the SMA is now the declaration of that doctrine." *Id.* C-15. The court held that Esplanade's Takings Clause claim was barred by the SMA because the SMA was enacted before Esplanade purchased its property:

> Esplanade's historical arguments would be more germane had it bought the property before 1971 and was challenging the effects of the SMA itself. Such a scenario would have made it analogous to the facts of *Lucas*. But a crucial difference between *Lucas* and this case is that *Lucas* was challenging a new statute which, he alleged, deprived him of reasonable use of his property. The Supreme Court therefore addressed whether "background principles" of South Carolina law would have precluded the uses anyway. These are not the facts presently before the court. Esplanade purchased the property in 1991, not 1891, and was thus subject to the limitations imposed by the public trust doctrine as codified in the SMA.

Id.

The court went on to conclude that Esplanade's proposed development was incompatible with its conception of the "modern" public trust doctrine. The court held that the proposed development would interfere with fishing and recreational use of Esplanade's property by the general public; in particular, the court noted that the property was just 700 feet away from a Discovery Park, a public recreation area. *Id.* C-19 - C-20. Because the proposed development was incompatible with this background principle of property law, the court concluded, Seattle's refusal to permit Esplanade to develop its property could not be deemed a regulatory taking for which compensation was required.

The Ninth Circuit affirmed. *Id.* A-1 - A-16. While stating that the public trust doctrine "has always existed in Washington," *id.* A-13, the Ninth Circuit admitted that the current conceptions of the doctrine are far broader than in decades past. In particular, the appeals court recognized "a long history 'favoring the sale of tidelands and shorelands,' resulting in the privatization of approximately 60 percent of the tidelands and 30 percent of the shorelands originally owned by the state." *Id.* (quoting *Caminiti v. Boyle,* 752 P.2d 989, 996 (Wash. 1987)). The court stated that the public trust doctrine had broadened in more recent years following adoption of the SMA in 1971; the court stated that adoption of the SMA evidenced the Washington legislature's determination that "'unrestricted construction on the privately owned or public owned shorelines . . . is not in the best public interest.'" *Id.* (quoting RCW 90.58.020). The court held that the public trust doctrine is "reflected in part in the SMA" and "ran with the title to the tideland properties and alone precluded the shoreline residential development proposed by Esplanade." *Id.* A-13 - A-14.

The appeals court held that development of Esplanade's property was inconsistent with the public trust doctrine and thus impermissible, because it would interfere with the public's use of the property for fishing and general recreation. *Id.* A-16. The court did not discuss the fact that Esplanade's chain of title predated 1971, nor did it discuss whether this Court's decision in *Palazzolo* affected the appeals court's determination that the 1971 SMA constituted a "background principle of property law" for purposes of evaluating Esplanade's Takings Clause claim.

In light of its ruling with respect to the public trust doctrine, the Ninth Circuit found it unnecessary to address the district court's alternative grounds for dismissal of the Takings Clause claim: that Esplanade failed to establish that its damages were proximately caused by Seattle's actions. *Id.* A-11.

REASONS FOR GRANTING THE PETITION

This case raises property rights issues of exceptional importance. Seattle insists, and the lower courts agreed, that it is absolved from any Takings Clause liability in this case despite the largely uncontested evidence that its regulation of Esplanade's property has eliminated all economic value from the property. The Ninth Circuit's sole rationale for that conclusion was that the modern version of the "public trust doctrine" -- which the appeals court found to preclude all development of Esplanade's property -- constitutes a "background principle[]" of property law of the type that *Lucas* and *Palazzolo* deemed sufficient to defeat a Takings Clause claim. Yet, as the lower courts candidly admitted, this modern version of the public trust doctrine dates back to

1971 at the earliest; it seemingly permitted residential development of Esplanade's property until Seattle ascribed a contrary interpretation to the SMA and the SSMP *after* Esplanade had filed its development application; and it was never articulated by a Washington court until 1987 at the earliest, if then.

Because Esplanade's chain of title to the property predates by at least 65 years the development of this modern version of the public trust doctrine, there is considerable tension between *Palazzolo* and the Ninth Circuit's determination that the modern public trust doctrine constitutes a background principle of property law sufficient to defeat Esplanade's regulatory taking claim. As the Court explained in *Lucas,* regulations that prohibit "all economically beneficial use of land" entitle the landowner to compensation under the Takings Clause, unless the regulatory prohibitions "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas,* 505 U.S. at 1029. *Palazzolo* made clear that if government regulation of property does not constitute a "background principle[]" of property law with respect to the Takings Clause claims of one owner, it cannot constitute a "background principle[]" of property law with respect to the Takings Clause claims of subsequent owners whose title derives from the initial owner. *Palazzolo,* 533 U.S. at 629-30. The Ninth Circuit's decision therefore conflicts with *Palazzolo* to the extent that the appeals court relied on the fact that Esplanade purchased its property after enactment of the SMA by the Washington legislature. Rather, Esplanade can be denied compensation in this case only if it can be shown that the modern public trust doctrine would constitute a "background principle[]" of

property law even with respect to a landowner who had purchased the Esplanade property in 1906.

Palazzolo explicitly left open the question whether newly-adopted legislation can constitute a "background principle[]" of property law sufficient to defeat a Takings Clause claim. *Palazzolo*, 533 U.S. at 629 ("We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here."). *Amici* submit that this case presents an ideal vehicle for addressing that question. There are few disputed issues of fact; for example, the lower courts agreed that development of first-class (urban) tidelands was encouraged by Washington law in past decades, and that it was not until the enactment of the SMA in 1971 that the State began to restrict such development.

Moreover, Washington is not unique among the States in its increasing concern over potential environmental hazards arising from developmental activity adjacent to and within the nation's waterways. Numerous State and local governments have sought in recent decades to impose new restrictions on such development. That trend has led to substantial numbers of Takings Clause suits filed by landowners whose property is rendered worthless by such regulation. The lower courts are in desperate need of additional guidance regarding the very question left open by *Palazzolo*: under what circumstances can environmental legislation designed to protect waterways constitute "background principles" of property law sufficient to preclude a Takings Clause claim by affected landowners? Indeed, numerous Takings Clause defendants have been raising the same defense raised by

Seattle herein: they cite a modern "public trust doctrine" that derives it content from recently enacted environmental legislation. Lower court have provided a variety of responses to that defense; *amici* respectfully suggest that the Court should step in to clear up the confusion.

Certiorari should be granted for the additional reason that the Ninth Circuit's answer to the preceding question is clearly incorrect. The Court made clear in *Palazzolo* that "[a] regulation or common-law rule cannot be a background principle for some owners but not for others." *Palazzolo*, 533 U.S. at 629. Yet, the Ninth Circuit made no effort to square its holding -- that Esplanade's proposed development is inconsistent with the modern public trust doctrine -- with the fact that the owners of many other tidelands within the City of Seattle have developed their property far more extensively than anything proposed by Esplanade. Indeed, Seattle has become the bustling port we see today precisely because numerous landowners have been permitted to erect above-water structures on their tidelands. In the absence of any explanation from Seattle regarding why such developments are allowed to remain in place yet Esplanade is prohibited from making *any* economically viable use of its property, *Palazzolo* dictates that the legislation cited by Seattle to support its prohibition cannot be deemed "background principles" of property law sufficient to bar Esplanade's Takings Clause claims. Certiorari should be granted to resolve the conflict between *Palazzolo* and the decision below.

I. REVIEW IS WARRANTED TO PROVIDE GUIDANCE ON THE IMPORTANT AND RECURRING QUESTION LEFT OPEN BY *PALAZZOLO* REGARDING WHAT CONSTITUTES A BACKGROUND PRINCIPLE OF PROPERTY LAW

Virtually all of the major regulatory taking cases that have come before the Court in recent years (*e.g.*, *Lucas, Palazzolo,* and *Tahoe-Sierra*) have involved land-use restrictions imposed for the purpose of preserving the environmental quality of adjacent bodies of water. That focus is hardly coincidental; the number of such regulatory taking cases has risen dramatically in tandem with the growing public consensus that governments at all levels must take decisive steps to prevent further degradation of marine environments. Landowners who bring such litigation do not dispute the need for such steps; rather, they claim that they are being singled out unfairly to bear the cost of new regulations.

In *Lucas,* the Court began the process of sorting out when the Takings Clause requires compensation for landowners whose property has been rendered worthless due to land-use restrictions imposed to prevent environmental harm. It determined that compensation is required in such cases unless the regulatory prohibitions "inhere in the title itself, in the restrictions that background principles of the State law of property and nuisance already place upon land ownership." *Lucas*, 505 U.S. at 1029. The Court did not endeavor to provide any detailed explanation regarding what constitute "background principles of the State law of property."

The Court provided additional guidance on this issue in *Palazzolo*. It held that if government regulation of property does not constitute a "background principle[]" of property law with respect to the Takings Clause claims of one owner, it cannot constitute a "background principle[]" of property law with respect to the Takings Clause claims of subsequent owners whose title derives from the initial owner. *Palazzolo*, 533 U.S. at 629-30. The Court explained:

> The State's rule [that postenactment purchasers cannot challenge a regulation under the Takings Clause] would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself.

Id. at 627.

Palazzolo reversed the Rhode Island Supreme Court's holding that the landowner's Taking Clause claims (based on decreased property value attributable to wetlands regulations) were barred because he had taken title with notice of the previously enacted regulations. *Id.* at 626-30. The Court did not, however, directly address whether those wetlands regulations could be deemed "background principles" of property law within the meaning of *Lucas*. Indeed, the Court explicitly held, "We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here." *Id.* at 629.

This case raises the precise issue left open by *Palazzolo*. Washington first adopted comprehensive regulation of tidelands development in 1971 when it enacted the SMA, and it was on the basis of this legislation that the Ninth Circuit determined that background principles of Washington property law precluded Esplanade's proposed residential development.[3]

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[3] The Ninth Circuit cited the "public trust doctrine" as the relevant "background principle" of property law. It also quoted the Washington Supreme Court as stating in 1987 that the public trust doctrine "has always existed in Washington." Pet. App. A-13 (quoting *Orion Corp. v. Washington,* 109 Wn.2d 621, 747 P.2d 1062, 1072 (Wash. 1987)). However, the court made clear that the "public trust doctrine" that it was invoking was not the same "public trust doctrine" that had "always existed in Washington." Rather, the court explained that it was invoking a more modern "public trust doctrine," one that takes into account the SMA adopted in 1971. *Id.* Indeed, the appeals court explicitly recognized that before 1971 Washington law had had a "long history" of favoring the sale and development of tidelands, particularly (as here) urban tidelands. *Id.*

The public trust doctrine, as initially recognized by Washington and other jurisdictions, imposed an obligation on States to ensure that any submerged lands sold by the States to private parties not be developed in a manner that would "substantially impair" the public interest in navigation, commerce, and fishing. *See, e.g. Illinois Central Railroad Co. v. Illinois,* 136 U.S. 387, 456 (1892). As originally conceived, that doctrine was never understood to prohibit development (or filling) of tidelands outside of commonly used navigation channels. Indeed, Esplanade's property would not have been deemed "navigable" under the original understanding of the public trust doctrine and as that term was used by the Washington Supreme Court as recently as 1973. *See Harris v. Hylebos Industries, Inc.*, 81 Wn.2d 770, 775, 505 P.2d 457 (1973) (the "line of navigability" is "the inner harbor line" -- a line well seaward both of the low water mark

(continued...)

Thus, the lower courts erred in dismissing Esplanade's Takings Clause claims – unless it is true, as both the district court and the Ninth Circuit held, that the SMA constitutes a background principle of property law that justifies a prohibition of all economically beneficial use of first class (*i.e.*, urban) tidelands in Washington.

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[3](...continued)
and of Esplanade's property); *id.* at 785-86 ("[T]idelands [deeded to private individuals by the State] have never been classified by the state as navigable waters, but have been treated as land."). *Harris* made clear that as of 1973, the Washington "legislative intent regarding the use of tidelands in harbors of cities is manifestly that the navigable portions of such harbors, behind the harbor lines, shall consist of commercial waterways, and that the filling and reclaiming of tidelands which have been sold to private parties shall be encouraged." *Id.* at 786. It was not until 1987 that the Washington Supreme Court, in *Caminiti* and *Orion*, adopted a modern version of the public trust doctrine that expanded that doctrine beyond its initial focus on preserving navigation and fishing rights:

> Historically, the trust developed out of the public's need for access to navigable waters and shorelands, and thus the trust encompassed the right of navigation and fishery. . . . Recognizing modern science's ability to identify the public need, state courts have extended the doctrine beyond its navigational aspects.

Orion, 109 Wn. 2d at 640-41. *Orion* went on to hold that land-use restrictions imposed by the SMA were exempt from challenge under the Takings Clause because the SMA qualified as "a public health and safety regulation." *Id.* at 660. Thus, it is evident that both the Ninth Circuit and the Washington Supreme Court decisions upon which it relied viewed a modern version of the public trust doctrine (one that included the SMA itself) – not the public trust doctrine as it was historically understood -- as the relevant "background principle[]" of property law.

The lower courts have reached widely disparate results when addressing the issue left open by *Palazzolo*. In many of those cases, governments have attempted to avoid Takings Clause claims by reference to a modern version of the "public trust doctrine" that incorporates recent legislative enactments. Several courts have explicitly rejected efforts to expand the public trust doctrine in this manner. *See, e.g., Douglaston Manor, Inc. v. Bahrakis,* 89 N.Y.2d 472 (1997) (refusing to extend the public trust to waters not navigable in fact because it would "precipitate serious destabilizing effects on property ownership principles and precedents"); *Bell v. Town of Wells,* 557 A.2d 168 (Me. 1989) (legislation allowing public recreation on private intertidal land amounted to a compensable taking); *Purdie v. Attorney General*, 732 A.2d 442 (N.H. 1999) (legislation extending the public trust to dry-sand areas would constitute a taking); *Anderson Columbia Co. v. Board of Trustees,* 648 So.2d 1061, 1067 (Fl. App. 1999) (legislative effort to assert public trust control over filled land previously granted to private owners would constitute compensable taking). Other courts, including the courts below, have reached the opposite conclusion. *R.W. Docks & Slips v. Wisconsin,* 628 N.W.2d 781 (Wis. 2001); *National Ass'n of Home Builders v. New Jersey Dep't of Environmental Protections,* 64 F. Supp. 2d 354, 359-60 (D.N.J. 1999) (statute requiring landowner to allow public access to privately owned riverside path is exempt from Takings Clause challenge under public trust doctrine).

Both in view of the importance of the question left undecided by *Palazzolo* and in view of the widely disparate answers provided by the lower courts to this issue, review by this Court is warranted. This case provides an ideal vehicle

for addressing the question, given that the facts of this case are largely undisputed. In particular, there can be no serious dispute that Seattle has deprived Esplanade of all economically productive use of its property. The only use of the property permitted under Seattle's zoning ordinance is residential housing, yet Seattle has prevented such use by simultaneously requiring and prohibiting on-site parking. Moreover, both the Ninth Circuit and the district court were explicit in identifying the SMA -- legislation not enacted until 1971 -- as their principal basis for concluding that Esplanade's Takings Clause claims were barred by "background principles" of Washington property law. Indeed, both courts acknowledged that before adoption of the SMA, state law actively promoted development of tidelands such as Esplanade's. Accordingly, this case squarely presents the issue left open by *Palazzolo,* a recurring issue of exceptional importance that has divided the lower courts.

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH *LUCAS* AND *PALAZZOLO*

Review is warranted for the additional reason that the Ninth Circuit's decision is in direct conflict with this Court's decisions in *Lucas* and *Palazzolo*. As noted above, those decisions did not fully define what constitutes a "background principle[]" of property law that would exempt property regulations from Takings Clause challenge. But the Court made clear one essential ingredient of any such background principles: they must apply equally to all property owners. *See, e.g., Palazzolo,* 533 U.S. at 630 ("A regulation or common-law rule cannot be a background principle for some owners but not for others.").

The modern public trust doctrine articulated by the Ninth Circuit fails that test. The appeals court ruled that its version of the public trust doctrine precluded all development of Esplanade's tidelands because development "would have interfered with fishing and recreational use of the tidelands."[4] But the City of Seattle clearly does not intend that the standard it applied to Esplanade should be applied to other tideland owners in the city. If that standard were applied uniformly, much of Seattle harbor would need to be dismantled. The harbor includes numerous above-water structures built on its tidelands. The continued presence of those structures undoubtedly interferes with the ability of the public to use those tidelands for recreational purposes. In the absence of any explanation from Seattle regarding why such developments are allowed to remain in place yet Esplanade is prohibited from making *any* economically viable use of its

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[4] *Amici* note that the Ninth Circuit's test is far stricter than the one heretofore employed by the Washington Supreme Court. That court has held:

> The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any *substantial impairment* of the public interest in the lands and waters remaining.

Caminiti, 107 Wn. 2d at 670 (emphasis added) (quoting *Illinois Central,* 146 U.S. at 453). Based on evidence that some individuals have on some unspecified occasions used the Esplanade tidelands for recreation and fishing, the Ninth Circuit determined that the planned development "would have interfered with those uses" and thus deemed the development "inconsistent with the public trust doctrine." Pet. App. A-16. The Ninth Circuit made no effort to determine whether such interference would constitute a "*substantial impairment* of the public interest in the lands and water remaining."

property, *Palazzolo* dictates that the SMA -- the legislation cited by Seattle in support of its prohibition -- cannot be deemed a "background principle[]" of property law sufficient to bar Esplanade's Takings Clause claim.

This Court has stated repeatedly that State and local governments may not redefine the meaning of property rights "by *ipsi dixit*," in order to avoid the strictures of the Takings Clause. *See, e.g., Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998). Seattle is attempting just such a redefinition in this case. It is attempting to defeat Esplanade's Takings Clause claim by insisting that Esplanade's ownership interests do not include the right to develop its tidelands, while declining to apply that same rule to other tideland owners. *Lucas* and *Palazzolo* dictate that such selectively-applied rules do not constitute background principles of property law sufficient to defeat Takings Clause claims. The Court should grant review in order to resolve the conflict between the decisions of this Court and the Ninth Circuit's decision.

CONCLUSION

Amici curiae respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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OPPOSITION

BRIEF

(5)

Supreme Court, U.S.
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No. 02-1304

IN THE

Supreme Court of the United States

ESPLANADE PROPERTIES, LLC,

Petitioner,

v.

CITY OF SEATTLE, WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding that the State of Washington's Public Trust Doctrine is a background principle of Washington law that burdens Petitioners' property and precludes them from prevailing on their claim that the City deprived them of all economically beneficial uses of the property?

2. Did the Court of Appeals err in affirming the dismissal of Petitioners' substantive due process claim for monetary damages for deprivation of property under the Fourteenth Amendment because such claim was subsumed by Petitioners' claim for monetary damages for deprivation of property without compensation under the Fifth Amendment?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption of the Petition for Writ of Certiorari, two other parties warrant mention. By Stipulation and Order of the trial court dated September 24, 2001, plaintiff Esplanade Properties, LLC amended its Complaint to substitute the original owners of the property as plaintiffs. The substituted parties are Larry D. Zahnow, individually, and Gladys I. Mandeville, individually and in her capacity as personal representative of the heirs and devisees of Robert W. Hillstead, deceased.

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Respondent the City of Seattle respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 307 F.3d 978.

STATEMENT OF THE CASE

A. Introduction

"It is beyond cavil that a public trust doctrine has always existed in Washington," said the court below, citing to Washington Supreme court cases. Pet. App. at A-13. It is also beyond cavil that it applies to Petitioner Esplanade's tidelands: "[t]he doctrine reserves a public property interest, the *jus publicum*, in tidelands and the waters flowing over them, despite the sale of these lands into private ownership." *Weden v. San Juan County*, 958 P.2d 273, 283 (Wash. 1998).

B. Relevant Facts

Esplanade purchased 6.1-acres of tidelands in 1991 for $40,000 from prior owners who believed the property could not be developed. ER 123; SER 120. The property is located in Elliott Bay below the precipitous southerly face of Magnolia bluff, waterward of the high water mark. SER 121-24. There is no dry land: the property is completely submerged for roughly half the day. SER 209-11. The property is navigable during high tides by most boat traffic, and regularly used for boating and recreation, facts never disputed by Esplanade, and amply demonstrated in the record. SER 314; 316-18. Native Americans fish in the waters that cover the property and the surrounding area, which, under the Treaty of Point Elliott, is a tribal "usual and accustomed" fishing ground. *Muckleshoot Indian Tribe and Suquamish*

Indian Tribe v. Hall, 698 F. Supp. 1504 (W.D. Wash. 1988). The adjacent tidelands are not developed, except for a large marina (a water-dependent use) some two miles to the East.

In 1992, Esplanade applied for permits for residential development on the property. The SSMP seemingly allowed above-water residential construction of residences on lots that had *less than* 30 feet of dry land; Esplanade had less because it had none.[1] The plan for the "Esplanade Estates" consisted of nine houses and a causeway built on concrete platforms supported by concrete pilings, protected by a large breakwater. SER 121; 122-24. The project appeared to have been designed without consulting the use or development standards of the SSMP, so it quickly ran into Code compliance problems. In early 1993, the City sent out Correction Notices identifying a wide range of items that needed to be corrected, some of which were critical to the project. SER 191-99. The project quickly ran into funding problems as well. Woefully under-capitalized from the outset, Esplanade could not pay its environmental consultant for its preliminary work on the Environmental Impact Statement (EIS). SER 186; 190. The EIS was never even started, even though no permits could ever have issued until it was published.

Esplanade made some corrections, applied for some variances, and requested three formal interpretations of significant SSMP provisions where Code compliance remained an issue, seeking a declaration that the project met the code provisions in question. SER 200-07. In particular,

1. The Seattle City Council later amended the provision to allow such use only when the lot had at least 15 feet of dry land, but the amendment did not apply to Esplanade's application, which, under Washington's "vesting" law, had to be processed according to the ordinances in effect on the date of application.

Esplanade desired parking on site over water. A provision of the SSMP prohibits parking over water unless it is accessory to a water-dependent or water-related use. Residential use of navigable waters and the associated aquatic lands as proposed by Esplanade is neither a water-dependent nor a water-related activity because it is not intrinsically or economically dependent on a waterfront location. These land use principles are outlined in the SSMP, and the City's application of those principles was affirmed by the Court of Appeals for the State of Washington when challenged by Esplanade. SER 224-36. The shoreline parking prohibition overrides the underlying Land Use Code (Code) requirement that there be parking at each residence because the SSMP specifically provides that in the event of conflicts between the shoreline regulations and the underlying zoning, the SSMP prevails. Seattle Municipal Code (SMC) 23.60.014(B)(1). Thus, there was no requirement that Esplanade provide parking on site at the same time that another regulation prohibited it, and no "regulatory Catch – 22." Pet. at 2.

Additional issues where the application was out of compliance related to the size of the proposed piers and docks, and design of the causeway from the bluff out to the houses, and the proposed parking over water. The appeal process began, going from the departmental interpretations to the City's Hearing Examiner, then to King County Superior Court, then to Division I of the State Court of Appeals. Esplanade lost on each issue at every level. SER 208-36. The Washington Supreme Court denied its petition for review on April 1, 1998.

After the Court of Appeals decision, the City sent a letter on November 21, 1997 instructing Esplanade to submit

revised plans consistent with the rulings on all of the code provisions within 60 days, in order to avoid cancellation. SER 251. On the 60th day, January 20, 1998, Esplanade submitted, not the required revisions conforming the plans, but simply an application for parking variances. SER 253-57. The City cancelled the application on April 13, 1998, *not* because it applied for a parking variance (Pet. at 2), but because Esplanade failed to pursue its application in a timely manner. SER 373. The cancellation occurred pursuant to a Code provision, which required an application to be deemed "abandoned and void", if the applicant failed without reasonable justification to submit all required data. Pet. App. C-5. The City's Code does not provide for administrative review of a cancellation.

C. Proceedings Below

In its Complaint, Esplanade alleged that the City's conduct, in its zoning regulations and its cancellation of the project application, resulted in an inverse condemnation violating the Fifth Amendment takings clause. ER 7-12. As its second cause of action, Esplanade alleged that the City violated its right to substantive due process by arbitrarily and capriciously canceling its project application and eliminating all reasonable economic use of the property. *Id*,.; Pet. App. at D-3.

In a series of orders on motions for summary judgment, the district court dismissed Esplanade's state and federal causes of action for violation of its substantive due process rights, holding that Esplanade's substantive due process claim was preempted by its other constitutional claim under *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), applying the rule of *Graham v. O'Connor*, 490 U.S. 386 (1989) to

takings claims under the Fifth Amendment. Pet. App. D. As to its takings claim, the district court held on alternative grounds that the City's regulations and actions were not responsible for any lack of economically viable use of Esplanade's property; first, because Esplanade's project was not financially or legally feasible, it could not show that the City proximately caused its alleged damages;[2] second, because background principles of Washington law — specifically Washington State's expression of the Public Trust Doctrine — would have precluded the development, the City could not be liable for taking a property right that did not exist. Pet. App. C.

The district court relied on the facts, unrebutted by Esplanade, showing that the development proposal would have interfered with the interests in navigable waters that are reserved to the public and protected by Washington's expression of the Public Trust Doctrine. Pet. App. C-19-20. On appeal, a panel (two members of which were seasoned jurists from Washington, well versed in the state's law) of the Court of Appeals for the Ninth Circuit affirmed on all three district court decisions. While it agreed with the district court that a plaintiff alleging a taking must make a showing of causation between the government action and the alleged deprivation of property, the Court of Appeals found it unnecessary to address the question. Because background principles of Washington state law would have precluded the proposed development, the claimed property right never existed. Pet. App. A-11. To reach this conclusion the Court of Appeals relied upon Washington's expression of the Public Trust Doctrine. Quoting from Washington case laws, the Court of Appeals observed that when Washington's tidelands

2. "The amount of undisputed evidence evincing the utter unfeasibility of this project is impressive." Pet. App. C-8.

are conveyed into private ownership, the public retains certain important interests in the use of those lands. Because the district court found that the proposed development would have impaired those publicly held interests in the underlying land, the Court of Appeals concluded that Esplanade did not have the right to develop the property as proposed and could not use this as the basis for a taking claim.

REASONS FOR DENYING THE WRIT

I. The Decision Below Reflects Washington State's Own Expression Of The Public Trust Doctrine.

The first and second questions presented by the Petition ask this Court to make pronouncements on state law of real property and do not present questions worthy of certiorari. Washington's Public Trust Doctrine relates only to Washington's own navigable aquatic lands. As this Court recognized in *Shively v. Bowlby*, 152 U.S. 1 (1894), an examination of

> the laws of the original states shows there is no universal and uniform law upon the subject, but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public.

Shively v. Bowlby, 152 U.S. at 26. Accordingly, the development of the doctrine is unique to each state and is applied to protect the unique public interests identified by

each state. "Great caution, therefore, is necessary in applying precedents in one state to cases arising in another." *Id. See also State v. Longshore*, 5 P.3d 1256, 1263 (Wash. 2000), citing *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988).

Washington, like some other states, has a developed body of law relating to the Public Trust Doctrine that applies to the navigable waters within its borders. *See* Ralph Johnson, *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521, 526-27 (1992). Washington's courts have stated that a Public Trust Doctrine has always existed in this state and that it applies to all navigable aquatic lands. *See Orion Corporation v. Washington*, 747 P.3d 1062, 1072 (Wash. 1987), *cert. denied*, 486 U.S. 1022 (1988).

Land that is subject to the Public Trust Doctrine is comprised of two elements — the *jus privatum* and the *jus publicum*. The Doctrine is recognition that certain attributes of these lands must be retained in public ownership, much like an easement that preserves certain public uses in the land. The state may, subject to normal constitutional and statutory restrictions, convey the *jus privatum* into private ownership. However, the State typically cannot convey the *jus publicum* interest. This interest is retained as a fundamental incident of the State's dominion over its aquatic lands and is held in trust for the public. *Caminiti v. Boyle*, 732 P.2d 989, 993 (Wash. 1987).

Washington's courts have also identified the interests that are protected. The public interests that are generally identified as having been retained include the rights of "navigation, together with its incidental rights of fishing, boating,

swimming, water-skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters." *Caminiti*, 732 P.2d at 994, quoting *Wilbour v. Gallagher*, 462 P.2d 232, 239 (Wash. 1969), *cert. denied*, 400 U.S. 878 (1970).

While the Public Trust Doctrine is often expressed in the form of judicial control over state action that is alleged to have impaired a retained public trust interest, Washington's courts have also recognized that the doctrine finds expression in the Washington Legislature's enactment of the Shoreline Management Act (SMA). *See Orion*, 747 P.2d at 1091 n.11. (Observing that "trust principles are reflected in the SMA's underlying policy. . . ." citing *Portage Bay-Roanoke Park Comm'ty Coun. v. Shorelines Hearings Bd.*, 593 P.2d 151 (Wash. 1979)). First enacted in 1971, this set of statutes is a form of zoning overlay. The Act directs the Washington State Department of Ecology to identify development standards that ensure that public trust values associated with the state's shorelines are conserved. Local Shoreline Master Programs must reflect these standards. *See* RCW 90.58.060 and RCW 90.58.070.

These observations on Washington's expression of the Public Trust Doctrine are significant for two reasons. First, the fundamental basis upon which the Court of Appeals upheld the district court was that the development, as proposed, was both inconsistent with the Seattle Shoreline Management Program (SSMP) and would interfere with the generally recognized public trust interests that Washington retained when it first sold these lands.

Esplanade could not provide parking on site because the form of development proposed — residential structures —

was not a water-dependent use of the State's navigable water. The SSMP reflects a determination that water-dependent development may further public trust interests in navigable waters. In contrast, nonwater-dependent uses of navigable waters tend to detract from public trust values.[3] In this case, the unrebutted facts presented to the district court showed that the development would interfere with activities that the public had reserved to itself under the Public Trust Doctrine. As such, the proposed development was inherently inconsistent with Washington's expression of the Public Trust Doctrine.

Petitioner's reference to the fact that these are first-class tidelands misses the point. Those tidelands have historically been developed, as indeed have many second-class tidelands located farther from city centers. Washington's shoreline has many wharves, docks and piers that support water-dependent development in both classes of tidelands. The SMA and local master programs allow for such water-dependent development. Historically, the common law Public Trust Doctrine has always permitted such development in aid of navigation. Petitioner's mistake is in assuming that first-class tidelands have been developed in any manner whatsoever completely free from any Public Trust Doctrine restrictions. That proposition simply misapplies how Washington has expressed that doctrine.

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3. For example, when Washington's aquatic lands are conveyed into private use by lease, RCW 79.90.460(2) directs that "[n]onwater-dependent uses of state-owned aquatic lands is a low priority use providing minimal public benefits and shall not be permitted to expand or established in new areas except in exceptional circumstances where it is compatible with water-dependent uses occurring in or planned for the area."

The second point is that the Ninth Circuit's application of Washington's unique expression of the Public Trust Doctrine does not "alter the disposition of tidelands beyond Washington." Pet. at 15. As noted above, the state has always been free to dispose of tidelands, and tideland grantees retain that same privilege. The doctrine simply provides a basis in state real property law for the preclusion of transfers or developments that will impair reserved public trust interests without impairing any constitutionally protected private property right. That is what the Shoreline Management Act seeks to preserve, and how it and the SSMP apply to Esplanades' development proposal.

Furthermore, because this is an expression of the Public Trust Doctrine that is unique to Washington, the Petitioner claims too much by asserting that the federal court's application of Washington law reaches out to other jurisdictions. It does not. The Court of Appeals expressly indicated that the "public trust doctrine, reflected in part in the SMA, unquestionably burdens Esplanade's property." Pet. App. at A-13. The court applied Washington law to the facts in this case and concluded that the petitioner had no right to build residences over tidelands in which the public had a retained interest. A-15 to 16. In reaching this conclusion the court relied upon Washington law and did not establish some principle that overrides other states' expressions of the Public Trust Doctrine.

II. The Decision Below Does Not Conflict With Washington State's Public Trust Jurisprudence Or That Of The Federal Court.

A. The Decision Below Does Not Conflict with Washington Law.

The decision below accurately quoted and faithfully followed the Washington Supreme Court's public trust cases. Pet. App. at 12 - A16. The Court of Appeals correctly found that the outcome of this case was controlled by the leading Washington case, *Orion*, *supra*, a case strikingly similar to this one, as it involved an alleged inverse condemnation by excessive regulation of a proposed residential development on previously undisturbed tidelands. The *Orion* court noted that because sovereignty over tidelands vested in the state upon admission to the Union, at the time the Orion Corporation purchased its tidelands, it purchased the land subject to the trust. Thus,

> Orion had no right to make any use of its property that would substantially impair the public rights of navigation and fishing, as well as incidental rights and purposes recognized previously by this court. Orion never had the right to dredge and fill its tidelands, either for a residential community or farmlands.

Orion, 747 P.2d at 1073. Since there could be no taking of private property because a "property right must exist before it can be taken," neither the SMA and local regulations effected a taking by prohibiting Orion's dredge and fill project. *Id.* (citations omitted).[4]

4. Esplanade claims at n.5, Pet. at 10, that *Orion* is inapposite because it deals with second-class tidelands, but fails to establish (Cont'd)

In the case at hand the district court held, and the Court of Appeals affirmed, that this part of Elliott Bay is navigable and used for fishing and recreation, that the proposed development would have interfered with those uses, and thus, Esplanade never had a right to use the property in the manner proposed, just as the Orion Corporation did not. That conclusion is in keeping with longstanding principles of Washington real property law, particularly insofar as Washington's navigable waters and the Public Trust Doctrine are concerned.

B. The Ninth Circuit's Decision Does Not Conflict With *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892).

Petitioner's claim that the Court of Appeals decision is in conflict with the *Illinois Central* case and that this court must resolve that conflict is not well taken. Even if true, that would be insufficient reason for this Court to accept *certiorari*, for this Court has recognized that "it has long been established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in land as they see fit." *Phillips Petroleum*, 484 U.S at 475. The State of Washington has *not*

(Cont'd)

that the geographical difference between first and second class tidelands makes a difference in regard to the public trust doctrine. Specifically, Esplanade cannot cite any case that holds that the public's right and interest in first class tidelands is *less than* the public's right in second class tidelands. The *Orion* court rejected the same line of argument that is made here — that the public trust doctrine did not apply because the state legislature decided to convey second-class tidelands to private parties for development. 747 P.2d at 1072.

seen fit to recognize private rights that violate the public's rights of navigation and fishery. Instead, it has held that such rights were never conveyed to tideland owners. *Orion*, *supra*.

Second, Petitioner's claim that the Ninth Circuit "radically departs" from *Illinois Central* principles and thus from the Washington cases citing it is not borne out in the state's Public Trust Doctrine cases. The portion of *Illinois Central* that Esplanade claims the Court of Appeals departed from was, in fact, relied upon by the Washington Supreme Court. The court relied on it in developing the test it uses for analyzing a claim that a specific exercise of legislative power with respect to tidelands and shorelands violates the Public Trust Doctrine:

> The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. (Footnote omitted).

Caminiti, 732 P.2d at 994; followed, *Weden v. San Juan County*, *supra*. That control test is applied to ensure that the public's reserved interests in its navigable aquatic lands are conserved.

Here, the district court found that the development would interfere with reserved public trust interests. Because that interference represents an impairment of public trust values without any offsetting public benefit in the form of water-dependent activity, as preferred in the SSMP, the Court of Appeals determination is consistent with the principles

outlined in *Illinois Central* as further developed in Washington's expression of the Public Trust Doctrine.

Petitioner reads *Illinois Central* to mean that the only public trust inquiry allowed goes merely to impairment of what remains of public lands and water after the subject parcel is subtracted from it. (Pet. at 10-11). Petitioner confuses the test for legislation with the quantum of property rights received by a purchaser of a tidelands parcel. Neither *Caminiti* nor *Weden* found the State to have ceded the *jus publicum*.

Not one of the Washington Public Trust Doctrine cases have construed the 1890-95 statutes allowing the individual sales of tidelands and shorelands to mean that the state legislature intended to convey the *jus publicum* and to extinguish the public trust in those lands. *Caminiti* recognized that the state had sold approximately 60 percent of its tidelands and 30 percent of its shorelands pursuant to these statutes, but held even so, that "[t]he Legislature has never had the authority, however, to sell or otherwise abdicate state sovereignty or dominion over such tidelands and shorelands." 732 P.2d at 992. *Accord*, *Orion*, 747 P.2d at 1072-73.

The few Washington cases that Esplanade cites for the proposition that the Court of Appeals' decision conflicts with *Illinois Central* as adopted into Washington law are inapposite, distinguishable either on their facts or on the law. For instance, *Harris v. Hylebos Industries, Inc.*, 505 P.2d 457 (Wash. 1973); *Washington v. Sturtevant*, 135 P. 1035 (Wash. 1913); and *Port of Seattle v. Seattle & Oregon R.R.*, 255 U.S. 56 (1921) are riparian rights case, not public trust cases, and the statements made in them concerning the quality of the state's ownership of its tideland are made in

emphasizing the complete absence of riparian or littoral rights in the state.

In any case, the distinction that Esplanade tries to make in order to claim that the lower court's decision conflicts with the *Illinois Central* test for legislation does not aid its theory, for even under Esplanade's version, its proposed project would indeed impair the public trust as a whole. The record below shows that the project involved the placement of scores of concrete pilings, topped by roads and houses. This not only displaces the public's right to go where the navigable waters go, but also substantially impairs the public trust in the surrounding tidelands as an obstruction both to navigation and to the drift nets used by tribal fishers. In addition, the development would have cut off public access to the publicly owned tidelands beyond Esplanade's property for hundreds of feet along the shore.

C. There is No Conflict with the Decisions of Other Circuits or States.

As for the claimed conflict with other circuits, there is none. We know from *Shively v. Bowlby* and *Phillips Petroleum* that the common law Public Trust Doctrine varies from state to state and has been altered in both statutes and in state constitutions. There could only be a true conflict between circuits on the matter if two state doctrines were identical in nature, and two circuit courts of appeal interpreted them, on basically the same fact pattern, in two contradictory ways. The two cases cited, *West Indian Company, Ltd. v. Virgin Islands*, 844 F.2d 1007 (3d Cir. 1988) and *Dardar v. Lafourche Realty Co., Inc.*, 985 F.2d 824 (1993) bear no resemblance to the case at hand, and, thus, present no such conflict.

III. The Ninth Circuit's Decision Applying State Law Does Not Raise An Important National Question Of Law.

Neither the Petitioner nor *amici* Washington Legal Foundation and New England Legal Foundation have cited a case of national importance on the issue of what is a "background principle" of law under *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992) that is at odds with the Ninth Circuit's opinion that under Washington law, the State did not convey to an owner of tidelands such as Esplanade a constitutionally protected right to fill and build in a way that would substantially interfere with navigation and fishery.

Amicus Pacific Legal Foundation brings to the Court's attention the recent case of *McQueen v. South Carolina*, __ S.E.2d __, 2003 WL 1957496 (S. Car. 2003). While that case cites to the Ninth Circuit's decision below, it did not apply the holding in this case to arrive at its conclusion that no taking had occurred. Instead, the South Carolina Supreme Court applied South Carolina's own expression of the Public Trust Doctrine, and its own background principles of property law, to determine that a lot owner had lost title to a piece of upland property that gradually became inundated due to coastal erosion. In essence, the court determined that South Carolina property law recognized a moving boundary between private uplands, and aquatic lands owned in fee by the state, in the case of erosion and accretion. The court merely concluded that the upland owner no longer owned the inundated parcel of former uplands and had no right to reclaim the land by fill. The citation to the Court of Appeals decision in this case was made for the simple and uncontested proposition that when background property principles demonstrate the absence of a property right, there can be no taking.

Because this Court has consistently held that each state has the authority to define the boundaries of its Public Trust Doctrine as well as the scope of the interests protected thereunder, the decision below is limited in its application to the State of Washington. Thus, within the context of the Court of Appeals' recognition of the State's Public Trust Doctrine as a "background principle" of Washington's property law that precluded Esplanade's claim of a categorical regulatory taking under *Lucas*, *supra*, its precedential value for other federal circuits and states is quite limited. What is a background principle of law in one state is not necessarily one in another. For prudential reasons, this Court should eschew the invitation presented by the *amicus* brief (at 10) of the Washington Legal Foundation to answer the question left open by the statement in *Palazzolo v. Rhode Island*, 533 U.S. 606, 629 (2001) that "[w]e have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law. . . ."

IV. The Case Presents No Issues Of Significant Public Importance Requiring Resolution Of Conflicts Regarding Substantive Due Process.

Petitioner asks its Third Question Presented as if the facts and theories relevant to its substantive due process claim are different from those applicable to the takings claim. This is not true. The Complaint uses the exact same facts — the City's actions regarding its shoreline development regulations and the cancellation of the permit application — to support both causes of action. Under the takings rubric, Esplanade alleged that, as a consequence of the city's actions, it lost all viable economic use of its property. In its second cause of action, it alleged that the acts of the City were arbitrary and capricious, eliminating all reasonable economic use of its

land, and that its right to substantive due process was thereby violated. The prayer for relief asked only for monetary damages, "in an amount equal to the just compensation to which plaintiff is entitle for the condemnation of its property," and the usual fees and costs. ER 7-12. The district court noted that Esplanade made no attempt to request either injunctive or declaratory relief, the standard relief associated with "arbitrary and capricious" type substantive due process claims. Pet. App. at D-4. "Thus," the court held, "because the Fifth Amendment offers explicit protection against the type of government conduct alleged in this case, under *Armendariz*, 'the claim must be analyzed under [the takings clause] alone, and not under the mere general guarantee of substantive due process,'" quoting *Macri v. King County*, 126 F.3d 1125 (9th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1997) (citing *Armendariz v. Penman*, 75 F.3d 311, 325-26 (9th Cir. 1996). Pet. App. at D-5. The Court of Appeals affirmed, noting that *Armendariz* is controlling precedent.

The ruling in *Armendariz* has been distinguished by some of the other circuits as noted by the Petitioner. However, this case does not present a meaningful vehicle for resolving the various conflicts among the circuits relating to substantive due process claims because the facts and relief requested in this case demonstrate that Esplanade's takings claim was essentially identical with its substantive due process claim. While the Fifth and Sixth, and perhaps, the D.C. Circuits may disagree with the Ninth's application of *Graham v. O'Connor* to takings cases, this case does not present a platform upon which this Court could meaningfully analyze any distinction between the two types of claims. The Court should wait for a case that would result in a more thorough delineation of the conflict among circuits. Any conflict is more meaningfully examined where contours of the parallel

claims may give rise to different forms of requested relief or require consideration of additional facts unique to one or the other claim.

In any case, should this Court accept *certiorari* on the issues presented in Petitioner's third Question Presented, it could, and should, do so without also accepting *certiorari* on the first two questions, which deal primarily with state law.

CONCLUSION

For all of the above-stated reasons, the City of Seattle respectfully asks this Honorable Court to deny the Petition.

Respectfully submitted,

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